IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHEASTERN DIVISION

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) Case No. 3:10-cv-06
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) ORDER ADOPTING REPORT AND
) RECOMMENDATIONS
)

On January 25, 2010, Mitchell David Holbach filed a habeas corpus petition under 28 U.S.C. § 2254 (Doc. #2). The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, pursuant to 28 U.S.C. § 636, recommending that Holbach's petition be dismissed without prejudice and that a certificate of appealability not be issued (Doc. #4). The Court set a deadline of April 12, 2010, to file objections to the Report and Recommendation. Holbach has not filed any objections.

Now, therefore, the Court has reviewed the Report and Recommendation, along with the entire file, and finds that the Magistrate Judge's position is correct. Accordingly, the Court hereby adopts the Report and Recommendation in its entirety. For the reasons set forth therein, Holbach's petition for habeas relief under 28 U.S.C. § 2254 is hereby **DISMISSED** without prejudice. Further, the Court finds that any appeal would be frivolous, could not be taken in good faith, and may not be taken in forma pauperis. Moreover, based upon the entire record before the Court, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this Court. See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997) (finding that district courts possess the authority to issue certificates of appealability under Section 2253(c)). If the petitioner desires further review of his petition, he may request

the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordances with <u>Tiedeman v. Benson</u>, 122 F.3d 518, 250-252 (8th Cir. 1997). Let judgment be entered accordingly.

IT IS SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 20th day of April, 2010.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief Judge
United States District Court